TEO YUNG PHIOW

v.

MALTIMOR SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[SUIT NO: 22-23-99-II]
28 DECEMBER 2001

CIVIL PROCEDURE: *Discovery - Bundle of documents and list of documents - Late service and filing - Notice to admit facts filed out of time - Whether party precluded from tendering said documents during trial - Rules of the High Court 1980, O. 24 r. 5(4) and 5(5), & O. 27 r. 5*

CIVIL PROCEDURE: *Trial - Pre-trial case management - Bundle of documents and list of documents - Late service and filing - Whether an abuse of court - Whether in breach of O. 34 Rules of the High Court 1980*

The court had ordered the defendant to file and serve a list of documents within 60 days from the date of its order. The defendant had delayed filing the said documents as per the stipulated date. The plaintiff raised a preliminary objection before this court on the late service and filing of the defendant's bundle of documents and list of documents.

Held:

[1] Where there is a court order for discovery, a party is obliged to make discovery of all the documents relevant to the matters in action. (p 129 d)

[1a] The purpose of discovery is to enable each party to use before or at the trial, relevant documentary materials to support or to rebut the case made by or against it; to prevent any element of surprise at or before the trial relating to documentary evidence; and also to reduce the cost and time of litigation. (p 130 b)

[2] In the event of a delay, O. 24 r. 5(4) of the Rules of the High Court 1980 ('RHC') provides that the defendant must seek the plaintiff's prior consent to prepare the list of documents, failing which such documents would be precluded from being tendered during trial. However, under sub-r. 5(5) the court could grant the defendant leave to tender such documents. (p 129 e)

[3] Order 27 r. 5 of the RHC provides that a party to a cause or matter may within 14 days serve notice to admit facts and also serve on any other party a notice requiring him to admit the authenticity of the documents specified in the notice. (p 129 g-h)

[4] Apart from infringing the court order, the defendant had also breached O. 24 r. 5(4) of the RHC and was precluded from tendering the said documents. The defendant had also filed the notice to admit out of time. (pp 129 f & 130 d)

[5] In light of O. 34 of the RHC, the defendant's conduct was inexcusable and therefore was precluded from tendering the said documents at the trial. (p 130 e)

[6] Not only was there an inordinate and inexcusable delay in the filing of the documents but there was a total disregard of the rules of the court, a contumacious conduct which amounted to a clear abuse of the process of the court. (p 130 g)

[7] The defendant could have circumvented the delay by filing an application for abridgment of time to file the documents or at least to obtain the plaintiff's consent for late filing. (p 132 a)

[Plaintiff's objection upheld.]

Case(s) referred to:

Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd and Chishty Coveney & Co v. Raja [1997] TLR 698 ***(refd)***

Choraria v. Sethia [1998] TLR 43 ***(refd)***

Manilal & Sons (Pte) Ltd v. Bhupendra Kumar J Shan [1990] 1 CLJ 623; [1990] 3 CLJ (Rep) 786 ***(refd)***

The MV Hong Leong'; Owners of the Ship MV Hong Leong v. Owners of the Ship MT Man Hua No 3 & Anor [1994] 3 MLJ 800 ***(refd)***

Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v. Lee Boon Tin [1998] 4 CLJ 368 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O 24 r. 5(4), (5), O. 27 rr. 2, 5, O. 34

For the plaintiff - Ernest Chua; M/s. Ernest Chua & Co
For the defendant - James Lo; M/s George Lo & Partners

Reported by M Maheswaran

JUDGMENT

Zakaria Sam JC:

At the outset of the hearing of this suit on 17 September 2001, the learned counsel for the plaintiff raised a preliminary objection on the late service and filing of the defendant's bundle of documents and list of documents which were filed on 3 August 2001 and 15 August 2001 respectively.

Background

On 24 April 1999, the court ordered the defendant to file and serve a list of documents within 60 days from the date of the said order (encl. 18).

As adverted to earlier, the defendant's bundle of documents and list of documents were only served and filed on 3 August 2001 and 15 August 2001 respectively (encls. 55 and 62). It is abundantly clear that the defendant was a long way out of time in filing and serving those documents as contained in the defendant's bundle. In general, where there is an order of court for discovery, a party is obliged to make discovery of all documents relevant to the matters in the action (see *Manilal & Sons (Pte) Ltd v. Bhupendra Kumar J Shan* [1990] 1 CLJ 623; [1990] 3 CLJ (Rep) 786.

Order 24 r. 5(4) of the Rules of the High Court 1980 (after this RHC), provides that if there is any delay, prior consent from the plaintiff is needed to prepare the defendant's list of documents. Non-compliance of sub-r. (4) shall preclude the party aforesaid from tendering such document at the trial save and except by the leave of the court under O. 24 r. 5(5) RHC.

In this case, apart from infringing the order of the court dated 24 April 1999, the defendant had also breached O. 24 r. 5(4) of RHC. The defendant is therefore precluded from tendering the said documents at the trial under O. 24 r. 5(5) except by the leave of the court.

As to the question of admission of documents under O. 27 r. 5 of RHC, it is not an issue here as the notice to admit facts was also filed out of time ie, on 3 August 2001 (encl. 55). Under O. 27 r. 2 RHC, the defendant is required to serve the notice to admit facts 14 days after the cause or matter is set down for trial. Order 27 r. 5 RHC also provides that a party to a cause or matter may within 14 days serve on any other party a notice requiring him to admit the authenticity of the documents specified in the notice.

In *'The MV Hong Leong'; Owners of the Ship MV Hong Leong v. Owners of the Ship MT Man Hua No. 3 & Anor* [1994] 3 MLJ 800, the learned counsel for the plaintiff submitted that certain exhibits tendered by the 2nd defendant were not admissible as they were not disclosed by the 2nd defendant in the lists of documents contrary to the rules governing discovery. The court in agreeing with the said submission, rejected the exhibits tendered by the 2nd defendant. The purpose of discovery which is to enable each party to use before or at the trial, relevant documentary materials to support or to rebut the case made by or against him; to prevent any element of surprise at or before the trial relating to documentary evidence; and also to reduce the cost and time of litigation.

The cause or matter before this court was set down for trial upon the filing of request for setting down action for trial (encl. 24) and notice of setting down the action for trial (encl. 25) by the plaintiff on 16 August 1999. Notice of hearing was then issued dated 20 December 1999 which set down the trial from 4 to 9 September 2000 (encl. 28). The trial was later adjourned to 17 and 18 September 2001 (due to various interlocutory applications filed in between). Thus, the filing of notice to admit documents by the defendant on 3 August 2001 was also out of time.

Further, the delay in filing and the service of the defendant's bundle of documents and list of documents had derailed the hearing of the action that was supposed to go on from 17 and 18 September 2001. This inexcusable conduct, especially in view of the new O. 34 RHC which came into effect on 22 September 2000, must certainly preclude the defendant from tendering those documents at the trial.

The new provisions as contained in O. 34 RHC were introduced to ensure early and speedy disposal of cases but the counsel for defendant had been back-peddling.

I observe that there is not only an inordinate and inexcusable delay in the filing of the documents but there is also a total disregard of the rules of the court. This contumacious conduct amounts to a clear abuse of the process of the court, bearing in mind that the case was supposed to be heard on 4 September 2000 and it had been adjourned to 17 September 2001. As a result, the defendant had ample time to file the documents. In this respect, I wish to refer to the case of *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v. Lee Boon Tin* [1998] 4 CLJ 368, where the Supreme Court referred to the case of *Arbuthnot Latham*

Bank Ltd v. Trafalgar Holdings Ltd and Chishty Coveney & Co v. Raja [1997] TLR 698 and *Choraria v. Sethia* [1998] TLR 43, and had this to say:

> From our observation, it is clear to us that from the two cases there emerged an additional limb to strike out a plaintiff's claim. The original two limbs had been laid down in *Birkett v. James*. We are not sure whether it is an offshoot of the second limb or it is a third limb. Be that as it may, this limb is important in view of the recent development in respect of case flow management. This new development is to overcome the backlog of cases now existing in courts in England. This new limb as we understood is to be from the two cases in that where there is inordinate and inexcusable delay which involves complete, total or wholesale disregard of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse so that if it is fair to do so, the action will be struck out or dismissed on that ground. From the decisions too, it appears to us that there is no necessity to show prejudice in such cases. As can be seen, the law in respect of case flow management in England will only be in operation in 1999 yet the courts there had already put many aspects of its operation to use.
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> There is no denial that in this country we have backlog of cases due to unnecessary delay. In fact, in some courts, the learned judge had taken the initiative to introduce case flow management in order to hasten the hearing of actions brought before his court. The importance of case flow management is for the parties to observe the time limits as provided by the law so that the action could be brought to trial within time. It is true that some parties had caused unnecessary delay due to non-observance of the time schedule provided by the Rules. We have amended certain provisions in the Rules of the High Court 1980 whereby time limits are given such as filing of affidavits. Our courts are definitely moving towards this case flow management era. As such, we see no reason why we should not adopt the principles stated in those two decisions." (at page 384 and 385)

The observation of His Lordship in the above case could now be found in the new O. 34 RHC *vide* PU(A) 342/2000 which came into effect on 22 September 2000.

Though the above authority is on the issue of want of prosecution, the principle as enunciated therein is also applicable to the facts of the instant case.

The defendant must face the consequence in respect of the late filing of the documents. The defendant could have circumvented the delay by filing an application for abridgment of time to file the documents or at least to get the consent of the plaintiff for the late filing. The omission of the defendant to do so, once again, reflected on the defiant attitude of its counsel.

The question that the plaintiff would not be prejudiced if the court allowed them to file a formal application for abridgment does not arise.

Conclusion

Upon the foregoing reasons, the plaintiff's objection is upheld. There is no order as to costs.